IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

RSA.No. 449 of 2003(C)

AS.388/1999 of DISTRICT COURT, THRISSUR
OS.728/1994 of I ADDL.SUB COURT, THRISSUR
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APPELLANTS/RESPONDENTS 8 TO 15 & LEGAL HEIRS OF 8TH DEFENDANT:

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1. **REMADEVI, D/O. HAR GOVIND SONY,**
   NEAR KULASSERY TEMPLE, VELIYANNUR DESOM,
   THRISSUR DISTRICT.

2. **HEMALATHA, D/O. HAR GOVIND SONY,**
   NEAR KULASSERY TEMPLE, VELIYANNUR DESOM,
   THRISSUR DISTRICT.

3. **SARALA, D/O. HAR GOVIND SONY,**
   NEAR KULASSERY TEMPLE, VELIYANNUR DESOM,
   THRISSUR DIST.

4. **DILEEP, S/O. HAR GOVIND SONY,**
   NEAR KULASSERY TEMPLE, VELIYANNUR DESOM,
   THRISSUR DIST.

5. **PRAKASH, S/O. HAR GOVIND SONY,**
   NEAR KULASSERY TEMPLE, VELIYANNUR DESOM,
   THRISSUR.

6. **SUNIL, S/O. HAR GOVIND SONY,**
   NEAR KULASSERY TEMPLE, VELIYANNUR DESOM,
   THRISSUR.

7. **NIRMALA, D/O. HAR GOVIND SONY,**
   NEAR KULASSERY TEMPLE, VELIYANNUR DESOM,
   THRISSUR.

8. BHAVANA, D/O. MAR GOVIND SONY,
   NEAR KULASSERY TEMPLE, VELIYANNUR DESOM,
   THRISSUR.

BY ADV. SRI.N.P.SAMUEL

RESPONDENTS: APPELLANT & RESPONDENTS 1 TO 5 IN A.S./
PLAINTIFF & DEFENDANTS 1 TO 5 IN O.S.:
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1. A.S.R.GOPALAKRISHNAN,
   S/O. KUNNATH SARASWATHY AMMA, NOW RESIDING AT
   PALAYAMKOTTA, THIRUNELVELI DISTRICT, TAMILNADU.

2. SARASWATHI AMMA,
   D/O. KUNNATHVEETTIL KUNJIKKAVAMMA,
   THIRUVAMBADY DESOM, NOW RESIDING AT NO.12,
   GOPALAN NATH MAIN STREET, PALAYAMKOTTA,
   THIRUVELVELI DISTRICT, TAMILNADU.

3. SUSHAMALATHA, TEACHER,
   D/O. KUNNATHVEETTIL SARASWATHY AMMA, THRISSUR,
   NOW RESIDING AT NO.12, GOPALAN NATH MAIN STREET,
   PALAYAMKOTTA THIRUNELVELI DISTRICT, TAMILNADU.

4. SWARNALATHA, W/O. M.HARIDAS,
   MANIMANDIRAM, VELIYANNUR, THRISSUR.

5. SANKARANARAYANAN,
   S/O. KUNNATHVEETTIL SARASWATHY AMMA,
   NOW RESIDING AT NO.12, GOPALAN NATH MAIN STREET,
   PALAYAMKOTTA, THIRUNELVELI, TAMILNADU.

6. SOBHANA,
   D/O. KUNNATHVEETTIL SARASWATHY AMMA,
   NOW RESIDING AT NO.12, GOPALAN NATH MAIN STREET,
   PALAYAMKOTTA, THIRUNELVELI, TAMILNADU.

BY ADV. SRI.K.G.BALASUBRAMANIAN for R1

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 04/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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M.SASIDHARAN NAMBIAR, J.

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R.S.A.No. 449 OF 2003

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DATED THIS THE 4th DAY OF OCTOBER, 2007

JUDGMENT

Legal heirs of 8th defendant in O.S.728 of 1994 on the file of Sub Court, Thrissur are the appellants. First respondent is the plaintiff and respondents 2 to 6 are defendants 1 to 5. First respondent instituted the suit seeking a decree for partition. The plaint schedule property was sought to be partitioned contending that the property was alloted under Ext.A1 partition deed in favour of Kunjikkavu Amma, her daughter second respondent and her sister Thankam @ Janaki Amma and Thankam @ Janaki Amma died as spinster in 1120 ME and mother Kunjikkavu Amma died in 1953 and on their death, their right devolved on second respondent and her children appellant and respondents 3 to 6 are her children and therefore each of them is entitled to 1/6 shares. It was contended that the house in the property was rented out and it was learnt that some document was executed in favour of sixth defendant, though first respondent was not aware of the document and on enquiry it was known that respondents 2 to 6 sold their right to sixth respondent. Seventh respondent is the tenant of the building. On

the death of the 6th defendant, eight defendant was impleaded as his legal heir. On his death, appellants were impleaded as his legal heirs in the first appeal. The said legal heirs are the appellants. First respondent sought division of the plaint schedule property into six shares and allotment of one such share. Respondents 2, 3, 4 and 6 remained exparte and 5th respondent, though appeared, did not file a written statement.

2. 7th defendant filed a written statement contending that 1st respondent is not entitled to claim any share in the property and the property was purchased by seventh defendant, but the document was taken in the name of sixth defendant, but it was purchased for the seventh defendant and sixth defendant Manjuala Bai H.Sonia had filed a petition before Rent Control Court for eviction and though eviction was ordered on the ground of arrears of rent, eviction was not ordered for bonafide need and first respondent is not entitled to the share. 8th defendant in his written statement contended that as per Ext.A1 partition deed, Kunjikkavu Amma and her daughters second respondent and Thankam @ Janaki Amma obtained only 8 ½ cents of land and on the death of Thankam as a spinster, her right devolved on the mother as provided under Section 36 of the

Cochin Nair Act and second respondent purchased 3/8 cents in Survey No.1566/1 1 and 3/8 cents in 1566/12 and these properties and the 8 ½ cents are lying contiguously and second respondent alone has right over the entire plaint schedule property and 7th defendant was residing in the building as a tenant and RCP 247 of 1976 was filed by second respondent against 7th defendant for eviction and 6th defendant also filed a Rent Control Petition and on the death of 6th defendant, her right devolved on 8th defendant and second respondent alone has right over the property and she sold the property to 6th respondent and though respondents 3 to 6 were also joined in the sale deed, they have no right over the property and second respondent requested 6th defendant for some more amount towards consideration and 6th defendant was not ready for it and when respondents 2 to 6 came to know that they could not get any more amount from 6th defendant, they colluded with first respondent and filed the suit and he is not entitled to claim any share and therefore the suit is to be dismissed.

3. On the evidence of PW1, DW1 and Exts.A1 and A2 and B1 and B2, learned Munsiff dismissed the suit holding that first respondent is not entitled to a share in the property. First

respondent challenged the decree and judgment before District Court, Thrissur in A.S.388 of 1999. Learned Additional District Judge, on reappreciation of evidence, found that the property was divided under Ext.A1 partition deed and alloted to the Thavazhi consisting of Ammukutty Amma @ Kunjikkavu Amma and her daughter Thankam @ Janaki Amma and first respondent and on the death of Thankam @ Janaki Amma (as a spinster) her right devolved on the other Thavazhi members and on the death of Ammukutty, her right also devolved on the other Thavazhi members consisting of second respondent and her children respondents 1 and 3 to 5 and therefore first respondent is entitled to 1/6 share. A preliminary decree for partition was passed directing division of the plaint schedule property into six shares and allotment of one such share to first respondent. As the rights of respondents 2 to 6 were purchased by 6th defendant, it was held that 8th defendant to whom that right devolved on the death of sixth defendant is entitled to the remaining shares. The legal heirs of 8th defendant filed this second appeal challenging the preliminary decree.

4. Learned counsel appearing for the appellants and learned counsel appearing for first respondent, who appeared on

receipt of notice in the application filed under Section 5 of Limitation Act to condone the delay in filing appeal, were heard.

5. Learned counsel appearing for appellants, relying on the decision of this court in **Neelakanta Pillai V. Madhavi Amma** (1958 KLT 890) argued that once there is a partition of the Tarawad, there is a disruption of the tharawad and the branch tharawad has lost its jointness once and for all and thereafter they takes in the property alloted to their share only as tenants in common and not as thavazhi and therefore under Ext.A1 partition deed properties alloted to Ammukutty Amma, first respondent and Thankam @ Janaki Amma were taken by them as tenants in common and therefore first appeallant son of second respondent did not derive any right in the property and finding of first appellate court that first respondent is entitled to a share is not sustainable. It was argued that as the parties are governed by Cochin Nair Act, as provided under Section 36 of the said Act, on the death of Thankam @ Janaki Amma, the daughter as spinster, her right devolved only on mother Ammukutty Amma and on the death of Ammukutty Amma her right devolved only on second respondent and therefore second respondent alone has right in the property and under Ext.B1 first

respondent agreed to sell the property in favour of 6th defendant and under Ext.B2, 6th defendant purchased the property and therefore first respondent has no right over the property.

6. Learned counsel appearing for first respondent, relying on the decision of this court in **Saraswathy Amma V. Radhamm**a(1990(2)KLT 183) argued that even though under Ext.A1 the tharawad was divided, the property alloted to Ammukutty Amma @ Kunjikkavu Amma and her children is an allotment to the thavazhy and on the birth of first respondent, being a member of the thavazhi, he is also entitled to a share and therefore the preliminary decree granted by first appellate court is perfectly correct.

7. The property sought to be divided in the suit is the property obtained by Ammukutty Amma, her daughter Thankam @ Janaki and second respondent under Ext.A1 partition deed. Ext.A1 establishes that the properties belonging to tharawad of Kalyani Amma was divided thereunder. Her son Appu, daughter Madhavi, Ammini and Ammukutty and their children under the female line were the members of the tharawad at that time. Under Ext.A1, son Appu was given one share, the thavazhi consisting of Madhavi and her children were given one share as

a group. Thavazhi consisting of Ammukutty and her daughters were given one share as a group and the other daughter Ammini was alloted another property taking into consideration even the child in the womb of Ammini, as she was pregnant at that time.

8. Learned counsel appearing fo S C C C r appellants argued that there is a disruption of the taravad under Ext.A1 and the properties alloted to Ammukutty and her children were not to their thavazhy or the thavazhy properties, but only properties alloted to those individuals and they take in only as tenants in common. The question whether the properties alloted in a tharawad partition to the thavazhi, consisting of one daughter and her children, would be taken with the incidents of a tharawad was not considered by this court in **Neelakanta Pillai's** case supra. The effect of a partition and allotment of share to the thavazhi, was considered by a learned Single Judge in **Saraswathy Amma's** case(supra). It was held that even if there was a partition of the tarawad, the properties alloted thereunder is having the incidents of the tarawad properties. A Marumakkathayam tharavad is a fluctuating body of persons forming a joint family with community of property, community of interest, unity of possession, right by birth and survivorship

which are its incidents. Existence of property is not necessary to constitute a tharavad or thavazhi. The propertly belongs to the group and is to enure to the benefit of not merely of the members in existence at a given time but also of the members to be admitted in future. The property obtained by a Marumakkathayee female towards her share under an outright partition in the tharavad or thavazhi will be her absolute property just like that of a male. So long as she remains single, she can alienate it just like a male member and no one could question it. But the property retains the character of tharavad or thavazhi property and becomes the property of the thavazhi on the birth of a child to her so as to destroy her absolute powers of disposal in respect of it when in the partition property was alloted to the mother and her then existing children, which is a natural tavazhy the allotment could only be taken as to that tavazhy.

9. Under Ext.A1, though the tharawad was divided, the thavazhi consisting of Ammukutty Amma and her daughters were given the property as a group. That group which is a natural tavazhy takes the property, with the incidents of the tarawad, and the moment a child is born to first respondent, he/she would

be a member of the thavazhi. Therefore when first respondent/ plaintiff was born to second respondent, he also became a member of the thavazhi so also respondents 3 to 6 and each of them is entitled to one share. The argument of learned counsel appearing for appellants that first respondent will not derive a right cannot be accepted. The finding of first appellate court that first respondent is entitled to a share is perfectly correct. It is clear from Ext.B2, the sale deed by which share of second respondent and her other children respondents 3 to 6 were purchased by 6th defendant, that the sale deed was obtained from respondents 3 to 6 also recognizing their right. The document itself shows that property was obtained by them as alloted to Kunjikkavu Amma and her children under Ext.A1. Hence it is futile for appellants to contend that children of second respondent including first respondent son will not derive a right in the property.

Appeal is therefore dismissed. It is made clear that the property directed to be divided is the property obtained under Ext.A1 partition deed. Learned counsel appearing for appellants submitted that the existing building in the plaint schedule property was constructed by 8th defendant and their right over

the building may be reserved. It is seen from the written statement that no such reservation was claimed. In such circumstances, it is not necessary to decide that question in this appeal.

M.SASIDHARAN NAMBIAR, JUDGE

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